



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

MAY 19 2006

CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Ellen Goldman, Esq.
7944 Santa Fe Drive
Overland Park, Kansas 66204

Re: Hayford Bridge Road Groundwater Superfund Site
Final Determination Concerning Confidentiality of Information

Dear Ms. Goldman:

This is in response to the claim for confidential treatment of documents submitted by Arch Technology Holding LLC and related entities (Findett Properties LLC, Findett LLC f/k/a Findett Acquisition LLC and Findett Real Estate Corporation f/k/a Findett Corporation f/k/a Findett Service Company). For purposes of this determination, these entities shall be referred to collectively as "the Companies".

The Companies submitted information to the United States Environmental Protection Agency ("EPA") on or about October 24, 2005, in compliance with EPA's Information Request issued pursuant to Section 104(e) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9604 (e), dated September 6, 2005. Initially, the Companies asserted a claim of confidentiality for all documents submitted. These documents are listed in Attachment 1.

By letter dated December 17, 2005, EPA requested that the Companies substantiate their claim of confidentiality ("request for substantiation") for all documents, excluding those captioned as B, C, G, and H on Attachment 1, which EPA will treat as confidential pursuant to Section 104(e)(7)(A) of CERCLA.¹ On February 16, 2006, the Companies submitted their substantiation for the remaining documents. In their substantiation letter, the Companies waived their claim of confidentiality for Document F, Articles of Incorporation and amendments thereof, for Findett Real Estate Corporation and Document L, Phase 1 Environmental Site Assessment for Findett Corporation.

1. Section 104(e)(7)(A) of CERCLA provides that information gathered under Section 104 shall be considered confidential if divulging the information would violate 18 U.S.C. § 1905 (prohibiting federal agents from disclosing any income return or any information relating to business operations or "to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association").

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Superfund



I have carefully considered the Companies' claim for the remainder of the documents. For the reasons stated below, I find that the remainder of the documents which the Companies claimed as confidential are entitled to confidential treatment.

DISCUSSION

Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604 (e)(7), allows companies required to submit information pursuant to 42 U.S.C. § 9604 (e) to claim confidentiality of that information if they can show that the information meets the criteria for confidential treatment set forth in 40 C.F.R. §2.208. EPA must find that disclosure of the information, commonly referred to as "Confidential Business Information" ("CBI"), is "likely to cause substantial harm to the business' competitive position." 40 C.F.R. §2.208(e)(1).

Confidential Business Information ("CBI")

Information may be exempt from release if it is CBI, i.e., "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The terms "commercial" or "financial," "should be given their ordinary meanings." Public Citizen, 704 F.2d at 1290 (citing Washington Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982)). The information at issue relates to the Companies' fiscal status, thereby meeting the ordinary definition of "financial". Since the Companies meet the definition of the term "person," as defined by EPA's regulations at 40 C.F.R. § 2.201(a), the information was "obtained from a person" pursuant to 42 U.S.C. §9604(e)(7).

Finally, in order to qualify as CBI, the information must be "privileged or confidential." The Companies have claimed this information to be confidential, but have not claimed this information to be privileged.

Required Submission

For a submission to be considered required, an agency must possess the authority to require submission of information to the agency and must exercise this authority. National Parks, 498 F.2d at 770; Center for Auto Safety v. NHTSA, 244 F.3d 144, 149 (D.C. Cir. 2001); Parker v. Bureau of Land Management, 141 F. Supp. 2d 71, 77-79, 78 n.6 (D.D.C. 2001); see also, Critical Mass, 975 F.2d at 880. The information was collected pursuant to EPA's authority under Section 104(e) of CERCLA, 42 U.S.C. §9604(e).

Because EPA not only has the authority to require submission of the information, but also has exercised its authority, the Companies' submission of the information was required. EPA must now determine whether the information is confidential.

Competitive Harm

As set forth in EPA's regulations at 40 C.F.R. § 2.208, required business information is entitled to confidential treatment if the business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business' competitive position.

To meet the competitive harm test, it is not enough to show that the release of the information would likely cause *any* potential for competitive harm. Rather, the Companies must demonstrate a likelihood of *substantial* competitive harm in order to overcome a strong presumption of disclosure. CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988).

As set forth in the request for substantiation, in order to support a claim for confidential treatment, the Companies must discuss with specificity why release of the information is likely to cause substantial harm to their competitive position. Further, the Companies must explain the nature of these harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. In addition, the Companies must explain how competitors could make use of this information to its detriment.

The Companies have asserted that the documents contain internal management procedures that may be utilized by competitors to interfere with any future bidding processes. Further, the Companies have stated that the material contains financial information that competitors could use to affect the competitive advantage of the Companies.

After careful consideration of the Companies' arguments, I find that the Companies have demonstrated that significant competitive harm would likely result from publicly releasing the information. The Companies have adequately shown that the information is highly sensitive to commercial operations and that the release of the information would place the Companies at a competitive disadvantage, thereby causing substantial harm to their competitive position. I, therefore, find that release of the requested information would likely result in unacceptable present and future practical and financial benefits to the Companies' competitors, and that the Companies would suffer substantial competitive injury as a result.

In sum, because the Companies have explained specifically how disclosure of the information would likely cause substantial competitive harm to themselves, the Companies have supported the claim, and the information is confidential under Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604 (e)(7).

CONCLUSION

I find that the information is entitled to confidential treatment. Therefore, this information will be kept confidential pursuant to Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7).

Should you have any questions concerning this matter, please call Audrey Asher, at (913) 551-7255.

Sincerely,

Not legal for MRJ

Martha R. Steincamp
Regional Counsel

enclosure

cc: Audrey Asher, CNSL
Steve Auchterlonie, SUPR

ATTACHMENT 1

- A.* Operating Agreement of Arch Technology Holding LLC.
- B.* 2004 U. S. Return of Partnership Income of Arch Technology Holding LLC.
- C.* Acquisition Agreement dated as of October 31, 2003 by and among Synergy Products, Inc., a Missouri corporation; Santovac Fluids, Inc., a Missouri corporation; Findett Corporation, a Missouri corporation; Manuel E. Joaquim, an individual; Ronald Joaquim, Trustee of the Erika Joaquim Irrevocable Trust under Trust Agreement dated April 28, 2000; and Arch Technology Holding LLC, a Missouri limited liability company.
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